



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 470 OF 2014**

**COUNTY GOVERNMENT OF UASIN GISHU.....CLAIMANT**

v

**KENYA NATIONAL UNION OF NURSES.....RESPONDENT**

**RULING**

1. The Kenya National Union of Nurses Uasin Gishu Branch (Union) wrote to the General Secretary, Kenya National Union of Nurses (Union) on 22 August 2014 informing him that the Union would pull out its members and other health workers out of their duty stations in solidarity with nurses employed under the Economic Stimulus Programme on 3 September 2014.
2. The letter was copied to several officials including the County Government of Uasin Gishu's (Claimant) officials.
3. This prompted the Claimant to file a Memorandum of Claim on 1 October 2014 seeking various reliefs but mainly declarations and injunctive orders. Together with the Memorandum of Claim, the Claimant filed a motion under certificate of urgency seeking a temporary injunction staying the strike called by the Union for 3 September 2014.
4. The motion was placed before Court on 2 October 2014, and the Court certified it urgent and granted a temporary injunction pending *inter partes* hearing on 9 October 2014.
5. The motion could not proceed on 9 October 2014 because the Union requested for more time to file its response. The interim orders were extended with the agreement of the Union's Advocate to 16 October 2014 when the motion was urged.

**Claimant's submissions**

6. The Claimant submitted that the strike called by the Union was illegal because it related to an essential service pursuant to sections 77-81 of the Labour Relations Act.
7. The Claimant further urged that the substratum of the main suit should be preserved by grant of injunctive orders and that the life of patients were at stake.
8. The authorities of *Saferider Management Systems Ltd v Comat Trading Co. Ltd* (2014) eKLR, *Kenya Ferry Services Ltd v Dock Workers Union* (2014) eKLR and *Seth Panyako & 5 others v Attorney General & 2 others* (2013) eKLR were cited.

**Union's submissions**

9. The Union contended that there was no strike because it had been called off but at the same time asserted that Article 41(2) (d) of the Constitution allowed workers to go on strike.
10. It was also submitted, based on the affidavit of Seth Panyako that prayers sought would adversely affect the nurses employed under the Economic Stimulus Programme as salaries would not be paid.

11. Further, it was contended that the Union had a recognition agreement with the Public Service Commission of Kenya and that the nurses had genuine grievances.

### **Claimant's rejoinder**

12. In a brief rejoinder, the Claimant submitted that the right to strike could be limited and is a qualified right subject to Article 24 of the Constitution.

### **Evaluation**

13. Pursuant to Article 24 of the Constitution, rights and fundamental freedoms can be limited by law. The right to strike is not among the rights and fundamental freedoms which cannot be limited by dint of Article 25 of the Constitution.

14. Although predating the Constitution, section 78(1)(f) of the Labour Relations Act prohibits strikes if the employer and employee are engaged in an essential service.

15. Section 81 of the Labour Relations Act has defined essential services and a perusal of the Fourth Schedule to the Act show that hospital services have been listed as an essential service.

16. In so far as the Claimant is the employer of the nurses under the Economic Stimulus Programme, any strike by the nurses would be a prohibited strike. At this juncture it is not very clear who the employer is, though it appears they are yet to be fully absorbed by the Claimant.

17. Further, Section 78(1) (f) of the Act also prohibits sympathetic strikes. The Union submitted that it has a recognition agreement with the Public Service Commission of Kenya. If that contention is correct, then the Claimant cannot be a party to the dispute but an Interested party. The letter from the Union was also clear that the strike was in solidarity with fellow Economic Stimulus Programme nurses. Clearly, this was a case of a sympathetic strike.

18. Before concluding, the Court has been bothered by the wording of the orders sought by the Claimant. Prayer 3 is to the effect that This Honourable Court be pleased to issue a temporary injunction staying the strike called by the Respondent's Uasin Gishu branch on 3 September, 2014 and restraining the Respondent, its members or agents from interfering with the operations of the facilities owned or managed by the Claimant pending the hearing and determination of the main suit.

19. Temporary injunctions are generally forward looking. Apart from satisfying the test enunciated in *Giella v Cassman Brown & Co. Ltd*, a grant of injunction always remains a discretionary remedy. The Claimant came to Court about one month after the strike was meant to take effect. The substratum of its cause of action appears to have withered away without the threatened strike being a reality.

20. In this scenario, I am not persuaded that the prayer sought would serve any useful or utilitarian purpose. Was the union to purport to call another strike that should be the subject of a fresh cause action.

21. Before concluding, the Court notes that the devolution of the health function has been controversial and County Governments should in good faith deal with the cases of the nurses initially employed under the Economic Stimulus Programme so as to engender industrial stability and peace within the health services.

### **Conclusion and Orders**

22. Considering the above examination of the respective parties' cases and submissions, the Court declines to exercise its discretion in favour of the Claimant and orders that the motion dated 1 October 2014 be dismissed with no order as to costs.

**Delivered, dated and signed in open Court in Nakuru this 14<sup>th</sup> day of November 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Kenei instructed by Gumbo & Associates Advocates

For Union Ms. Ashubwe instructed by Eshiwani Ashubwe & Co. Advocates